UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

In re:	Lead Case No. 1:03-cv-49
UNUMPROVIDENT CORP. SECURITIES LITIGATION	CLASS ACTION
	MDL Case No. 1:03-md-1552
	Judge Curtis L. Collier

SILVIO AZZOLINI, on behalf of himself and all others similarly situated,	
Plaintiff,	Case No. 1:03-cv-1003
v.	CLASS ACTION
CORTS TRUST II FOR PROVIDENT FINANCIAL TRUST I, et al.,	MDL Case No. 1:03-md-1552
Defendants.	Judge Curtis L. Collier

HARRIET BERNSTEIN, on behalf of herself and all others similarly situated,	
Plaintiff,	Case No. 1:03-cv-1005
v.	CLASS ACTION
CORTS TRUST FOR PROVIDENT FINANCING TRUST I, et al.,	MDL Case No. 1:03-md-1552
Defendants.	Judge Curtis L. Collier

DONALD and CLAIRE FINKE, on behalf of themselves and all others similarly situated,	
Plaintiffs,	Case No. 1:03-cv-1006
	CLASS ACTION

v.	)	
	)	MDL Case No. 1:03-md-1552
CORTS TRUST II FOR PROVIDENT FINANCING TRUST I, et al.,	)	Judge Curtis L. Collier
Defendants.	)	

BETTY STRAHLE, on behalf of herself and all others similarly situated	)	
	)	Case No. 1:03-cv-1007
Plaintiff,	)	
	)	CLASS ACTION
v.	)	
	)	MDL Case No. 1:03-md-1552
CORTS TRUST II FOR PROVIDENT FINANCING TRUST I, et al.,	)	Judge Curtis L. Collier
Defendants.	)	

M E M O R A N D U M

Before the Court are a pair of matters related to the organization and leadership structure of the securities fraud class actions contained within this multidistrict litigation. Glickenhaus & Co. ("Glickenhaus"), Lead Plaintiff in *In re UnumProvident Corp. Sec. Litig.*, has filed a motion seeking to consolidate its putative securities fraud class action with four other putative securities fraud class actions presently pending before this Court as part of Multidistrict Litigation Number 1552 ("MDL-1552") (Master File No. 36).[1] Documents in opposition to Glickenhaus' motion were filed by Plaintiff in *Bernstein* (Master File No. 38); jointly by Plaintiffs in the *Azzolini*, *Finke*, and *Strahle* actions (Master File No. 37); and jointly by Defendants Salomon Smith Barney, Inc., CitiGroup, Inc., Prudential Securities, Inc., and First Union Securities, Inc. (collectively "Underwriter Defendants")

[1]Citations to the court file reference the MDL Master File (Case No. 1:03-md-1552) unless otherwise indicated by case number.

(Master File No. 40). Glickenhaus filed a reply (Master File No. 42) and the Underwriter Defendants filed a sur-reply (Master File No. 43). Additionally, Plaintiffs in the *Azzolini*, *Finke*, and *Strahle* actions have filed a motion to consolidate their actions, appoint co-lead plaintiffs, and approve their selection of co-lead counsel (Court File No. 1, Doc. No. 4, Case No. 1:03-cv-1003). For the reasons stated below, the Court will **DENY** the motion by Glickenhaus and **GRANT** the motion by the *Azzolini*, *Finke*, and *Strahle* Plaintiffs.

I. RELEVANT FACTS

UnumProvident Corporation ("UnumProvident"), a Delaware corporation with its principal place of business in Chattanooga, Tennessee, is the parent company of a number of insurance companies operating throughout the United States and abroad. Through its subsidiaries, the company provides a wide range of group and individual insurance products including disability insurance, life insurance, long-term care insurance, and payroll-deducted voluntary benefits plans offered by employers to their employees. UnumProvident and various of its officers, directors, subsidiaries, and affiliates are presently named as defendants in a number of lawsuits in this and other district courts across the country based on general allegations UnumProvident systematically denied valid claims for insurance benefits and then misrepresented the company's financial results and prospects by failing to disclose these practices to the investing public. Included in this number are shareholder derivative actions and various putative class actions alleging wrongful denial of benefits, securities fraud, and violations of Employee Retirement Income Security Act ("ERISA") fiduciary duties in the operation of UnumProvident's 401(k) plan. Pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation ("JPML") has transferred these actions to this Court for

consolidated and/or coordinated pretrial proceedings. The present motion implicates the five securities fraud class actions included in MDL-1552. A brief chronological summary of the procedural history of each of these cases is provided:

A. *In re UnumProvident Corp. Sec. Litig.* (Case No. 1:03-cv-49)

On February 12, 2003, Frank W. Knisley ("Knisley") filed a putative class action lawsuit in this Court against UnumProvident; J. Harold Chandler, the company's former president, chief executive officer, and chairman of the board of directors ("Chandler"); and Robert C. Greving, a director and the company's chief financial officer ("Greving") (Court File No. 1, Case No. 1:03-cv-49). Knisley's complaint asserted claims under sections 10(b) and 20(a) of the Securities Exchange Act of 1934 ("1934 Act") and Rule 10b-5 promulgated thereunder (*id.* ¶¶ 39-48) on behalf of "purchasers of UnumProvident Corporation . . . publicly traded securities during the period from May 7, 2001 to February 4, 2003" (*id.* ¶ 1). In accordance with 15 U.S.C. § 78u-4(a)(3)(A)(i), Knisley published a notice of his putative class action on *Business Wire* on that same day (Court File No. 19, Exh. B, Case No. 1:03-cv-49).

On April 14, 2003, Glickenhaus filed a motion to consolidate the Knisley action with five similar putative securities fraud class actions pending in or to be transferred to this Court and be appointed lead plaintiff in the consolidated class action (Court File Nos. 16, 18, Case No. 1:03-cv-49). Pursuant to Orders entered by this Court on May 21, 2003, and January 21, 2004, these six actions were consolidated for all purposes into one putative securities fraud class action entitled *In re UnumProvident Corp. Sec. Litig.* (Lead Case No. 1:03-cv-49) (Court File No. 50, Case No. 1:03-cv-49; Master File No. 34). All six of these actions were included in MDL-1552 pursuant to the JPML's September 2, 2003 Transfer Order (Master File No. 1). On November 6, 2003, the Court

named Glickenhaus Lead Plaintiff in these consolidated securities fraud class actions and approved its selection of Milberg Weiss Bershad Hynes & Lerach, LLP, to serve as Lead Counsel (Court File No. 77, Case No. 1:03-cv-49). Glickenhaus then filed a consolidated class action complaint on January 9, 2004 (Court File No. 83, Case No. 1:03-cv-49). Glickenhaus filed the present motion for further consolidation on January 15, 2004 (Court File No. 85, Case No. 1:03-cv-49).

B. *Azzolini* (Case No. 1:03-cv-1003), *Finke* (Case No. 1:03-cv-1006), & *Strahle* (Case No. 1:03-cv-1007)

On May 8, 2003, Silvio Azzolini ("Azzolini") filed a putative class action lawsuit in the United States District Court for the Southern District of New York against CorTS Trust II for Provident Financial Trust I ("CorTS Trust II"), UnumProvident, Salomon Smith Barney, Inc. ("Salomon"), Chandler, and Greving (Court File No. 1, Doc. No. 1, Case No. 1:03-cv-1003). Azzolini's complaint asserted claims under sections 10(b) and 20(a) of the 1934 Act, Rule 10b-5, and sections 11 and 15 of the Securities Act of 1933 ("1933 Act") on behalf of "all persons who purchased UnumProvident Corporate-Backed Trust Securities ('CorTS') Certificates pursuant to an initial public offering on or about April 18, 2001, and/or in the aftermarket for CorTS through and including March 24, 2003" (*id.* at ¶ 1). On May 9, 2003, Azzolini published notice of his putative class action on *PRNewswire* (*id.* Doc. No. 4, Exh. B).

On May 15, 2003, Donald and Claire Finke ("the Finkes") filed a putative class action in the Southern District of New York asserting the same claims on behalf of the same class, but naming three additional defendants: CitiGroup, Inc. ("CitiGroup"), Prudential Securities, Inc. ("Prudential"), and First Union Securities, Inc. ("First Union") (Court File No. 1, Complaint, Case No. 1:03-cv-

1006). On June 11, 2003, Betty Strahle ("Strahle") filed a third putative class action in the Southern District of New York asserting the same claims on behalf of the same class against the same set of defendants as the *Finke* action (Court File No. 1, Complaint, Case No. 1:03-cv-1007).

On July 8, 2003, Azzolini, the Finkes, and Strahle filed a joint motion to consolidate their respective cases, be collectively named co-lead plaintiffs, and have the law firms of Wolf Haldenstein Adler Freeman & Herz, LLP, and Kirby McInerney & Squire, LLP, approved as Co-Lead Counsel (Court File No. 1, Doc. No. 4, Case No. 1:03-cv-1003). The *Azzolini* action was transferred to this Court in the original Transfer Order entered by the JPML on September 2, 2003 (Master File No. 1). The *Finke* and *Strahle* actions were later transferred to this Court in a subsequent transfer order entered by the JPML on October 6, 2003 (Master File No. 16). No action has been taken, either by this Court or the transferor court, with respect to the motion for consolidation and designation of lead plaintiff and lead counsel.

C. *Bernstein* (Case No. 1:03-cv-1005)

On July 7, 2003, Harriet Bernstein ("Bernstein") filed a putative class action lawsuit in the United States District Court for the Eastern District of New York against CorTS Trust for Provident Financial Trust I ("CorTS Trust I"), PFT, UnumProvident, Salomon, CitiGroup, Chandler, and Greving (Court File No. 1, Doc. No. 1, Case No. 1:03-cv-1005). Bernstein's complaint asserted claims under sections 10(b) and 20(a) of the 1934 Act, Rule 10b-5, and sections 11 and 15 of the 1933 Act on behalf of "persons buying UnumProvident Corporate-Backed Trust Securities ('CorTS') Certificates pursuant or traceable to an initial public offering on or about January 31, 2001 through March 24, 2003, inclusive" (*id.* at ¶ 1). Bernstein published a notice of her putative class action on *Business Wire* on July 10, 2003 (*id.* Doc. No. 6, Exh. B).

On September 8, 2003, Bernstein filed a motion seeking appointment as lead plaintiff and approval of her selection of the law firms of Stull Stull & Brody and Kantrowitz Goldhamer & Graifman, PC, as co-lead counsel (*id.* Doc. Nos. 4-6). On September 17, 2003, District Judge John Gleeson ("Judge Gleeson") entered an order granting Bernstein's motion (*id.* Doc. No. 7). Pursuant to an order entered on October 6, 2003, the JPML transferred the *Bernstein* action to this Court for coordinated and/or consolidated pretrial proceedings (Master File No. 16).

II. DISCUSSION

Glickenhaus filed the present motion on January 15, 2004, seeking to (1) vacate the district court's previous order in the *Bernstein* case naming a lead plaintiff and designating lead counsel, and (2) consolidate the four CorTS cases (*Azzolini*, *Finke*, *Strahle*, and *Bernstein*) with the previously consolidated *In re UnumProvident Corp. Sec. Litig.* actions under the leadership of Glickenhaus (Master File No. 36). The two actions sought by Glickenhaus are discussed separately below.

A. *Bernstein* Lead Plaintiff Order

Glickenhaus argues the order entered by the Eastern District of New York should be vacated on the basis of mistake, inadvertence, "questionable behavior," and as a matter of law under the PSLRA (Master File No. 36, pp. 12-15). Bernstein responds by contending there is no basis either in fact or law for vacating the order (Master File No. 38, pp. 5-10). The Federal Rules of Civil Procedure provide:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; . . . or (6) any other reason

justifying relief from the operation of the judgment.

Fed. R. Civ. P. 60(b). Glickenhaus contends all of these reasons support vacatur of Judge Gleeson's lead plaintiff order. Because Rule 60(b) speaks only of granting relief to "a party or a party's legal representative," Glickenhaus, a non-party to the *Bernstein* action, arguably has no standing to seek relief thereunder.[2] However, neither Glickenhaus nor Bernstein raised this issue in their motions and the Court finds it unnecessary to address this matter since it ultimately rules in favor of Bernstein on the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 97, 118 S. Ct. 1003, 1013, 140 L. Ed. 2d 210 (1998) (statutory standing, unlike Article III standing, need not be decided before addressing the merits); *see also United States v. Buck*, 281 F.3d 1336, 1339 (10th Cir. 2002). Accordingly, the Court will proceed assuming, *arguendo*, Glickenhaus has standing to raise all its asserted claims for relief.

1. Mistake, Inadvertence, Surprise, or Excusable Neglect

Citing Rule 60(b)(1), Glickenhaus claims Judge Gleeson "may have been mistaken about the procedural status of the case and was unaware of the other pending actions" and such mistake or inadvertence entitles Glickenhaus to relief from the *Bernstein* lead plaintiff order (Master File No. 36, p. 12-13). To the extent Glickenhaus relies upon Rule 60(b)(1), its motion is effectively a motion for reconsideration of Judge Gleeson's order based on evidence which was allegedly not before him at the time. A claim of legal error in an underlying order or judgment falls within the definition of

[2]Some courts have permitted non-parties to bring Rule 60(b) motions where they are sufficiently connected to and identified with the action, but only under limited circumstances and pursuant to specific provisions of Rule 60(b). *See Eyak Native Village v. Exxon Corp.*, 25 F.3d 773, 777 (9th Cir.), *cert. denied*, 513 U.S. 943, 115 S. Ct. 351, 130 L. Ed. 2d 307 (1994) (non-party may seek Rule 60(b) relief from a judgment procured by fraud if non-party's "interests are directly affected"); *Dunlop v. Pan American World Airways, Inc.*, 672 F.2d 1044, 1052 (2d Cir. 1982) (non-parties had standing to invoke Rule 60(b)(6)); *Southerland v. Irons*, 628 F.2d 978, 980 (6th Cir. 1980) ("a claim of fraud on the court may be raised by a non-party").

mistake under Rule 60(b)(1). *United States v. Reyes*, 307 F.3d 451, 456 (6th Cir. 2002); *Pierce v. United Mine Workers of Am. Welfare and Retirement Fund for 1950 and 1974*, 770 F.2d 449, 451 (6th Cir. 1985). However, a Rule 60(b)(1) motion based on legal error must be brought within the normal time for taking an appeal. *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989). Courts have held a district court's order designating a lead plaintiff under the PSLRA is not an appealable collateral order. *See Z-Seven Fund, Inc. v. Motorcar Parts & Accessories*, 231 F.3d 1215, 1218-19 (9th Cir. 2000); *Pindus v. Fleming Companies, Inc.*, 146 F.3d 1224, 1226 (10th Cir. 1998). *See also In re BankAmerica Corp. Sec. Litig.*, 263 F.3d 795, 801 (8th Cir. 2001). Thus, because no appeal is permitted from a lead plaintiff determination, Glickenhaus cannot use Rule 60(b)(1) as a substitute therefor. *See Hopper*, 867 F.2d at 294 ("The parties may not use a Rule 60(b) motion as a substitute for an appeal . . . or as a technique to avoid the consequences of decisions deliberately made yet later revealed to be unwise.").

Nevertheless, the Court does have the continuing authority to alter, amend, or modify its own orders in furtherance of the administration of justice unless otherwise restricted by statute. *See In re Manufacturers Trading Corp.*, 194 F.2d 961, 963 (6th Cir. 1952). As a result of the MDL proceedings, this Court now has the authority to modify the Eastern District of New York's previous orders as if they were its own. However, the Court sees no reason to do so. The underlying factual basis for Glickenhaus' arguments under both Rule 60(b)(1) and Rule 60(b)(3), discussed *infra*, is Judge Gleeson's alleged lack of knowledge of "the procedural status of the case and . . . the other pending actions" (Master File No. 36, p. 12). Glickenhaus contends Judge Gleeson was not aware "of the proceedings pending in the Eastern District of Tennessee, nor was he aware that the filing deadline for any party to move for lead plaintiff had long since passed" (*id.* at 13). In response to

Glickenhaus' motion, Bernstein notes she specifically informed Judge Gleeson of two CorTS Trust II Actions pending in the Southern District of New York[3] and the inclusion of those actions in the JPML's original transfer order (Master File No. 38, p. 7). Additionally, Bernstein contends Defendants UnumProvident, Chandler, and Greving filed a "Notice of Potential 'Tag-Along' Action" on September 12, 2003, indicating the *Bernstein* action could potentially be transferred to this Court by the JPML (*id.*). Bernstein has submitted a copy of this notice dated September 12, 2003, and stamped "received" September 15, 2003 (*see* Master File No. 38, Exh. 4), yet for whatever reason this notice does not appear in the court file or docket sheet transmitted from the Eastern District of New York (*see* Court File No. 1, Case No. 1:03-cv-1005).[4]

In summation, the evidence combined with the allegations of the parties indicate Judge Gleeson was, at a minimum, aware of the existence of at least one other CorTS class action and an MDL proceeding in the Eastern District of Tennessee, but not aware of the pendency of the *In re UnumProvident Corp. Sec. Litig.* actions. Thus, the question now before the Court centers on whether full knowledge of the facts and procedural posture of all the various securities fraud class

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[3]Bernstein's lead plaintiff motion cites *Keir v. UnumProvident Corp., et al.*, C.A. No. 1:02-8791, and *Azzolini v. CorTS Trust II for Provident Fin. Trust I, et al.*, C.A. No. 1:03-3257 (Court File No. 1, Doc. No. 4, p. 7 n.4, Case No. 1:03-cv-1005). The Court is not aware of a *Keir* action asserting CorTS claims, though a class action brought by Theresa Keir (C.A. No. 1:02-8781) alleging wrongful denial of ERISA benefits was included in the JPML's Transfer Order of September 2, 2003 (Master File No. 1).

[4]Since the facts as stated by Bernstein's counsel and as supported to some extent by the Notice of Potential "Tag-Along" Action filing somewhat undermine the factual basis of Glickenhaus' argument and, as detailed more fully *infra*, the Court was unable to find a legal foundation for much of Glickenhaus' argument, the Court will reiterate some of the principles it stated at the Initial Management Conference on January 16, 2004. First, the Court expects counsel to communicate with each other. Had counsel communicated with each other here, Bernstein's counsel could have supplied Glickenhaus' counsel with their understanding of the facts and the documents. Second, the Court expects counsel to thoroughly investigate the facts and research the law so that counsel has the utmost confidence in the filings it presents to the Court. Third, the Court expects counsel to be mindful of the burden imposed upon the Court when unnecessary or poorly thought-out filings are presented to the Court. The Court expects all counsel to practice in this case with these and the other principles discussed at the Initial Management Conference in mind.

actions included in MDL-1552 warrant reconsideration of Judge Gleeson's order. The Court finds it does not.

The *In re UnumProvident Corp. Sec. Litig.* actions could potentially have a preclusive effect on motions for and the determination of lead plaintiff in the *Bernstein* action if, and only if, the two putative class actions were consolidated for all purposes.[5] Such is not presently the case, nor is the Court aware of any motion which has ever been filed seeking such consolidation. Glickenhaus explicitly states in its reply that it presently "seeks consolidation of these related cases for **pre-trial purposes** only" (Master File No. 42, p. 3) (emphasis in original). Undoubtedly, it would be within the Court's authority and discretion to consolidate the *In re UnumProvident Sec. Litig.* actions and the *Bernstein* action (or all of the CorTS actions) and designate Glickenhaus lead plaintiff for pretrial purposes, but doing so would not obviate the need for a designated lead plaintiff available to take the *Bernstein* action to trial once it is returned to the Eastern District of New York upon conclusion of pretrial proceedings in this Court.

The Court fails to see how the pendency of six consolidated securities fraud class actions in the Eastern District of Tennessee have any relevancy to the determination of a lead plaintiff in a second and distinguishable securities fraud class action in the Eastern District of New York, even assuming the second action was brought on behalf of a subset of the class alleged in the first. Therefore, such information remains irrelevant to the lead plaintiff determination in *Bernstein* and Judge Gleeson's lack of such knowledge cannot support a finding of mistake or legal error under

[5]Citing Rule 60(b)(4), Glickenhaus' argues later in its motion the notice published in the first-filed securities fraud class action, *Knisley*, was sufficient to apprize Bernstein of her right to move to be appointed lead plaintiff in that action (Master File No. 36, p. 14). Therefore, Glickenhaus contends, Bernstein's subsequent lead plaintiff motion in her own class action almost five months after the 60-day window for filing such a motion in the *Knisley* action had closed was barred by the PSLRA (*id.*). Because the Court ultimately finds this argument unpersuasive, *see infra* § II.A.3, it will not consider any implications it might have on Glickenhaus' argument premised on Rule 60(b)(1).

Rule 60(b)(1).

2. Fraud, Misrepresentation, or Other Misconduct

A movant seeking relief under Rule 60(b)(3) must demonstrate by clear and convincing evidence an adverse party "engaged in deliberate or reckless misbehavior" falling within the categories of fraud, misrepresentation, or other misconduct. *Jordan v. Paccar, Inc.*, 97 F.3d 1452, 1996 WL 528950, at *8-9 (6th Cir. Sept. 17, 1996) (table opinion). "Fraud" involves deliberate omissions where a response is required by law or necessary to render volunteered information non-misleading; "misrepresentation" requires an affirmative misstatement; and "other misconduct" reaches "questionable behavior affecting the fairness of litigation" other than statements or omissions. *Id.* at *6. Although the moving party generally need not show the violation was result-altering, the non-moving party "should be permitted to demonstrate by clear and convincing evidence that the misbehavior which occurred had *no prejudicial* effect on the outcome of the litigation." *Id.* at *8-9 (emphasis in original).

The crux of Glickenhaus' Rule 60(b)(3) claim is alleged "questionable behavior" on the part of Bernstein in not giving Judge Gleeson "the full benefit of Bernstein's counsel's knowledge concerning the various pending actions" (Master File No. 36, p. 13). Glickenhaus contends counsel for Bernstein was aware of the various putative securities fraud class actions pending in this Court, the need to move to be named lead plaintiff in those actions by April 14, 2003, and that those actions involved parties with a claim to lead plaintiff status in the *Bernstein* case (*id.*). As stated *supra* in section II.A.1, the Court does not see how such information was relevant to Bernstein's motion. Therefore, Bernstein's failure to provide this information to Judge Gleeson, no matter how deliberate or calculated, cannot amount to fraud, misrepresentation, questionable behavior, or misconduct of

any kind.

3. Voidness

Glickenhaus next argues Judge Gleeson's order is void as a matter of law because it was based on a lead plaintiff motion filed outside the 60-day window provided for by the PSLRA and triggered by the publication of notice of the *Knisley* action (Master File No. 36, p. 14). *See* Fed. R. Civ. P. 60(b)(4). A judgment is void if the court entering the order lacked jurisdiction over either the subject matter or the parties, or if it acted in a manner inconsistent with due process of law. *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995). A void judgment is a complete nullity from its inception and without legal effect, therefore, the Court lacks discretion to deny a motion to vacate a void judgment. *Id.*; *see also Jalapeno Property Management, LLC v. Dukas*, 265 F.3d 506, 515 (6th Cir. 2001) (Batchelder, J., concurring). A judgment is not void simply because it is erroneous. *Id.* at 515-16. In the interest of finality, the concept of void judgments is narrowly construed and Rule 60(b)(4) does not offer a substitute for an appeal. *Id.* at 515-16. Only in the rare instance of a clear usurpation of power will a judgment be rendered void. *Id.* at 516 (quoting *Lubben v. Selective Serv. Sys. Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972)).

In light of these principles, the question before the Court is a narrow one: whether the Eastern District of New York lacked jurisdiction to enter a lead plaintiff order or did so in violation of due process of law. Glickenhaus' argument is premised on the lead plaintiff provisions of the PSLRA, specifically the strict 60-day window in which motions for lead plaintiff must be filed. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i)(II); *In re Telxon Corp. Sec. Litig.*, 67 F. Supp. 2d 803, 818 (N.D. Ohio 1999) ("The PSLRA is unequivocal and allows for no exceptions."). Glickenhaus argues the published notice of the first-filed securities fraud class action was sufficient to apprize Bernstein of

her right to move to be appointed lead plaintiff in that action and her failure to do so "was fatal to her application to be appointed for a separate sub class" filed almost seven months after the original notice in the *Knisley* action (Master File No. 36, p. 14). Glickenhaus effectively contends once the 60-day deadline has passed in a putative securities fraud class action, the PSLRA's lead plaintiff provisions not only prohibit a party from being named lead plaintiff based on a subsequently filed motion in *that* action, but also deprive all federal courts of jurisdiction over lead plaintiff motions pending or subsequently filed *in any other action* brought on behalf of a class arguably encompassed by the first action. The Court has found no support for this proposition and Glickenhaus has cited no authority even remotely implying such. Absent an injunction stating otherwise, a class action does not attain any preclusive effect until it is settled or disposed of on the merits. There is no indication Congress intended the PSLRA to give a lead plaintiff determination any preclusive effect beyond the particular class action(s) it addresses.

Taken to its logical conclusion, Glickenhaus' argument would interpret the PSLRA as completely barring the filing or maintenance of any even tangentially related securities fraud class actions in any federal jurisdiction after notice of the first such action is published. Clearly this is not the case, as five virtually identical securities fraud class actions were filed following the *Knisley* notice, including one originally filed in the Southern District of New York (*Martin, et al. v. UnumProvident Corp., et al.*, Case No. 1:03-cv-162) which was transferred to this Court for all purposes prior to the MDL proceedings and consolidated into *In re UnumProvident Corp. Sec. Litig.* (Master File No. 34). Neither Glickenhaus nor any of the other lead plaintiff candidates in those actions ever suggested any of those actions were somehow jurisdictionally barred. Rather, they were consolidated upon motion by the plaintiffs and the Court selected Glickenhaus as lead plaintiff.

Even assuming the class alleged by Bernstein is a wholly-encompassed subset of the class alleged in *Knisley* and the published notice was sufficient to notify Bernstein and any other CorTS purchasers of their rights, the expiration of the 60-day period for filing lead plaintiff motions in the *In re UnumProvident Corp. Sec. Litig.* actions had no effect on the prosecution of other class actions elsewhere. Therefore, there is no indication the Eastern District of New York lacked jurisdiction to enter the *Bernstein* lead plaintiff order.

Nor is there any indication Judge Gleeson's ruling violated due process. Bernstein published notice of her class action consistent with the requirements of the PSLRA and filed her lead plaintiff motion within 60 days. Nothing in the PSLRA or the Federal Rules of Civil Procedure required Bernstein to serve Glickenhaus with any of its pleadings or provide it with any special notice above and beyond the general notice of class action required by 15 U.S.C. § 78u-4(a)(3)(A)(i). If Glickenhaus felt Bernstein's action or any of the other CorTS actions were preempted in any way by its own securities fraud class action, it was incumbent upon either Glickenhaus or the defendants named in both actions to raise such an objection.

4. Rule 60(b)(6)

Finally, Glickenhaus argues the *Bernstein* lead plaintiff order should be set aside based on exceptional circumstances within the contemplation of Rule 60(b)(6) (Master File No. 36, pp. 14-15). Rule 60(b)(6) allows a court to provide relief from a judgment or order for "any other reason justifying relief." A motion under Rule 60(b)(6) is addressed to the Court's discretion, "which is 'especially broad' given the underlying equitable principles involved." *Johnson v. Unknown Dellatifa*, — F.3d —, 2004 WL 200575, at *3 (6th Cir. Feb. 3, 2004). However, relief is warranted "only in exceptional or extraordinary circumstances which are not addressed by the first five

numbered clauses of [Rule 60(b)]." *Hopper v. Euclid Manor Nursing Home, Inc.*, 867 F.2d 291, 294 (6th Cir. 1989).

Glickenhaus' argument under Rule 60(b)(6) simply reiterates its characterization of the circumstances surrounding Judge Gleeson's decision, the conduct of Bernstein's counsel, and the application of the PSLRA's 60-day rule as cited in support of its requests for relief under subsections (1), (3), and (4) (Master File No. 36, p. 15). While the maintenance of multiple class actions in different jurisdictions simultaneously would certainly complicate matters, this is not the sort of exceptional circumstance contemplated by Rule 60(b)(6). In any event, this concern is greatly diminished now that all the cases have been transferred to this Court for pretrial proceedings. Further coordination, consolidation, or modification of any existing leadership structures is more properly considered in the context of the Court's broad authority to manage the litigation included within MDL-1552, which the Court addresses *infra* in section II.B.

B. Consolidation

Glickenhaus argues the four CorTS actions should be consolidated for pretrial purposes with Glickenhaus serving as Lead Plaintiff for all of the securities fraud actions. Glickenhaus contends such a course of action is both required by this Court's May 21, 2003 Order (Court File No. 50, Case No. 1:03-cv-49) and consistent with the objectives and intent of the PSLRA (Master File No. 36, pp. 9-11). Plaintiffs and the Underwriter Defendants in the *Azzolini*, *Finke*, *Strahle*, and *Bernstein* actions all oppose consolidation on the general grounds Glickenhaus cannot adequately represent the CorTS plaintiffs (Master File Nos. 37, 38, 40).

The Federal Rules of Civil Procedure provide "[w]hen actions involving a common question of law or fact are pending before the court . . . it may order all the actions consolidated." Fed. R.

Civ. P. 42(a). Whether to consolidate and the purposes and scope of any ordered consolidation are matters within the Court's discretion. *See Williams v. Gilless*, 19 F.3d 1425, 1994 WL 66666, at *1 (6th Cir. Mar. 4, 1994) (table opinion).

Glickenhaus first argues the Court's previous Order consolidating the various putative securities fraud class actions pending at that time in this Court mandates further consolidation of the CorTS cases (Master File No. 36, pp. 4-5, 9). The Court's May 21, 2003 Order provided:

> Any other actions now pending or hereafter filed in this District that arise of the same facts and claims should be consolidated for all purposes if and when they are brought to the Court's attention and the Court accepts the transfer and approves consolidation.

(Court File No. 50, ¶ 2, Case No. 1:03-cv-49). Nothing in this language *requires* any of the CorTS actions be consolidated with the *In re UnumProvident Corp. Sec. Litig.* actions. In fact, consolidation is expressly conditioned upon the Court's approval. In its reply, Glickenhaus further suggests consolidation is somehow mandated or at least strongly supported by the JPML order transferring these cases to this Court (Master File No. 42, pp. 7-8). However, that the cases may involve common questions of fact so as to make centralization of pretrial proceedings appropriate does not necessarily mean mass consolidation of all securities fraud cases would contribute to the efficient progress of such proceedings. As Glickenhaus notes, the JPML left the degree of coordination or consolidation in the MDL-1552 cases entirely at the Court's discretion (*id.*).

Glickenhaus next argues consolidation is consistent with the design and purpose underlying the PSLRA which counsels against the creation of niche or fragmented subclasses of claims (Master File No. 36, pp. 9-11). Glickenhaus cites a number of cases finding separate lead plaintiff subclasses undesirable and expressing a preference for a single lead plaintiff to represent the interests of an

entire class. *See In re Enron Corp. Sec. Litig.*, 206 F.R.D. 427, 451 (S.D. Tex. 2002); *Greenberg v. Bear Stearns & Co.*, 80 F. Supp. 2d 65, 69-70 (E.D.N.Y. 2000); *Aronson v. McKesson HBOC, Inc.*, 79 F. Supp. 2d 1146, 1150-51 (N.D. Cal. 1999). Each of these cases cited the PSLRA's preference for a single lead plaintiff, the need for efficiency, and the desire to avoid delay, confusion, or unnecessary expenses as reasons supporting the designation of a single, strong lead plaintiff to lead a unified class, at least for pretrial purposes. Glickenhaus further argues the designation of "niche" plaintiffs for sub-classes based on type of security, legal claims, theory of recovery, or scienter and proof requirements contravenes the PSLRA's expressed desire to place control of class action securities litigation in the hands of investors rather than their attorneys.

In response, the CorTS plaintiffs argue Glickenhaus has never previously purported to represent CorTS investors and, in any event, lacks standing to do so (Master File No. 37, pp. 8-19). Because they are not "UnumProvident publicly-traded securities," the CorTS plaintiffs contend neither Glickenhaus' Consolidated Amended Complaint[6] nor any of the original complaints filed or PSLRA-mandated notices published in relation to any of the actions now consolidated in *In re UnumProvident Corp. Sec. Litig.* encompass investors in CorTS Certificates (Master File No. 37, pp. 8-14). The Underwriter Defendants offer a similar argument in opposition to consolidation, contending the CorTS Certificates are not securities issued by UnumProvident (Master File No. 40, pp. 12-20). If the CorTS Certificates are deemed to involve a different issuer and fall outside the language used in Glickenhaus' class allegations, the Court finds no precedent supporting

[6]Glikenhaus' Consolidated Amended Complaint alleges a class comprising "all persons who: purchased any UnumProvident publicly-traded securities on the open market during the period March 30, 2000 and April 24, 2003" (Court File No. 83, ¶ 229; Case No. 1:03-cv-49). Each of the constituent class actions within *In re UnumProvident Corp. Sec. Litig.* and the PSLRA notices published in connection therewith contain a similar class definition, although the consolidated amended complaint extended the beginning date of the class period more than one year.

consolidation in such circumstances. *See In re Initial Pub. Offering Sec. Litig.*, 241 F. Supp. 2d 281, 294-95 (S.D.N.Y. 2003) (noting more than 1,000 original complaints were consolidated into 309 coordinated actions by issuer). However, the Court finds it unnecessary to parse the exact class language utilized in the Glickenhaus complaint or analyze the legal implications of the structural mechanics of the CorTS Certificates. Even assuming applicable legal precedent clearly supported the Court's authority to order consolidation under the present circumstances, the Court finds consolidation of the CorTS cases and the *In re UnumProvident Corp. Sec. Litig.* actions unadvisable at this point in time.

Undoubtedly the CorTS cases and the *In re UnumProvident Corp. Sec. Litig.* actions involve common questions of fact and law as they both present securities fraud claims based on alleged improper claims processing practices and the non-disclosure thereof on the part of UnumProvident and its officers and directors. There is a substantial amount of overlap in the factual allegations contained in the two sets of complaints and a large portion of the discovery sought by the plaintiffs will be identical. It is for these reasons that the JPML sent these cases to this Court for consolidated and coordinated pretrial proceedings in the first place. However, as Glickenhaus concedes, the various CorTS actions must ultimately be returned to their court of origin for trial upon the conclusion of pretrial proceedings while the *In re UnumProvident Corp. Sec. Litig.* actions will remain in this Court for their ultimate disposition (*see* Master File No. 42, p. 8). Moreover, if the CorTS actions were to be consolidated to the extent of the Court's authority, Glickenhaus would be required to amended its Consolidated Amended Complaint to include named plaintiffs who purchased the CorTS Certificates and factual allegations relating to the CortTS Certificates. *See In re Initial Pub. Offering Sec. Litig.*, 214 F.R.D. at 123 (holding lead plaintiff need not necessarily

have standing to sue on all possible causes of action on behalf of all possible class members as long as named plaintiffs have such standing). Additionally, the Court would be required to examine the CorTS plaintiffs and the *In re UnumProvident Corp. Sec. Litig.* plaintiffs separately at the class certification stage and distinct issues will likely arise in motions to dismiss anticipated from the defendants. While none of these considerations preclude the Court from consolidating the actions, the Court believes the maintenance of separate Lead Plaintiffs will allow matters to forge ahead expeditiously, present anticipated issues in a more concise manner, and generally promote the efficient progress of pretrial proceedings.

The Court notes the PSLRA specifically instructs courts to postpone lead plaintiff determinations until after resolving all pending consolidation motions. 15 U.S.C. § 78u-4(a)(3)(B)(ii). While Glickenhaus claims the CorTS plaintiffs filed their actions outside the bounds imposed by the PSLRA, Glickenhaus was certainly made aware of at least the *Azzolini* action by September 2, 2003, when the JPML entered its initial Transfer Order, yet made no attempt to consolidate that action or any of the other CorTS actions with the *In re UnumProvident Corp. Sec. Litig.* actions prior to the Court's ruling on the competing lead plaintiff motions more than two months later. While consolidation may have been appropriate and/or desirable at a previous point in time, the Court believes consolidation at this stage of the proceedings would only delay matters and hinder the efficient progress of these coordinated pretrial proceedings.

III. CONCLUSION

Because the Court finds no basis upon which to vacate the September 17, 2003 order entered by the United States District Court for the Eastern District of New York and concludes consolidation

of the CorTS actions with the *In re UnumProvident Corp. Sec. Litig.* actions would not promote the efficient and expeditious resolution of pretrial proceedings in MDL-1552, the Court will **DENY** Glickenhaus' motion (Master File No. 36).

The Court will additionally **GRANT** the pending motion to consolidate the *Azzolini*, *Finke*, and *Strahle* actions, appoint co-lead plaintiffs, and approve of the selection of co-lead counsel (Court File No. 1, Doc. No. 4, Case No. 1:03-cv-1003). Accordingly, the Court will **CONSOLIDATE** those cases under the moniker *Azzolini, et al. v. CorTS Trust II for Provident Fin. Trust I, et al.*, Lead Case No. 1:03-cv-1003; **DESIGNATE** Silvio Azzolini, Donald Finke, Claire Finke, and Betty Strahle as Co-Lead Plaintiffs; and **APPROVE** the selection of the law firms of Wolf Haldenstein Adler Freeman & Herz, LLP, and Kirby McInerney & Squire, LLP, as Co-Lead Counsel in this consolidated putative securities fraud class action. Co-Lead Plaintiffs shall be subject to the same duties and responsibilities as other previously designated lead plaintiffs in the other actions comprising MDL-1552 as set out in detail in the Practice and Procedure Order (Master File No. 9) and the Second Management Order (Master File No. 34) and shall file a consolidated class action complaint within thirty (30) days of the entry of the accompanying Order.

Finally, the Court will **LIFT** the stay on the Defendants' obligation to answer, move, or otherwise respond to the various securities fraud class action complaints (Master File No. 34, § VI.C.2).

An Order shall enter.

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CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

In re:	Lead Case No. 1:03-cv-49
UNUMPROVIDENT CORP. SECURITIES LITIGATION	CLASS ACTION
	MDL Case No. 1:03-md-1552
	Judge Curtis L. Collier

SILVIO AZZOLINI, on behalf of himself and all others similarly situated,	
Plaintiff,	Case No. 1:03-cv-1003
v.	CLASS ACTION
CORTS TRUST II FOR PROVIDENT FINANCIAL TRUST I, et al.,	MDL Case No. 1:03-md-1552
Defendants.	Judge Curtis L. Collier

HARRIET BERNSTEIN, on behalf of herself and all others similarly situated,	
Plaintiff,	Case No. 1:03-cv-1005
v.	CLASS ACTION
CORTS TRUST FOR PROVIDENT FINANCING TRUST I, et al.,	MDL Case No. 1:03-md-1552
Defendants.	Judge Curtis L. Collier

DONALD and CLAIRE FINKE, on behalf of themselves and all others similarly situated,	
Plaintiffs,	Case No. 1:03-cv-1006
	CLASS ACTION

v.	)	
	)	MDL Case No. 1:03-md-1552
CORTS TRUST II FOR PROVIDENT FINANCING TRUST I, et al.,	)	Judge Curtis L. Collier
Defendants.	)	

BETTY STRAHLE, on behalf of herself and all others similarly situated	)	
	)	Case No. 1:03-cv-1007
Plaintiff,	)	
	)	CLASS ACTION
v.	)	
	)	MDL Case No. 1:03-md-1552
CORTS TRUST II FOR PROVIDENT FINANCING TRUST I, et al.,	)	Judge Curtis L. Collier
Defendants.	)	

O R D E R

In accordance with the accompanying memorandum, the Court **DENIES** Glickenhaus & Co.'s motion to vacate the September 17, 2003, lead plaintiff order in *Bernstein v. CorTS Trust for Provident Fin. Trust I, et al.* (Case No. 1:03-cv-1005) and consolidate the above captioned actions for pretrial purposes (Master File No. 36). Additionally, the Court **GRANTS** the joint motion by Plaintiffs Silvio Azzolini, Claire Finke, Donald Finke, and Betty Strahle to consolidate their actions (Court File No. 1, Doc. No. 4, Case No. 1:03-cv-1003). The Court hereby **CONSOLIDATES** those actions as *Azzolini, et al. v. CorTS Trust II for Provident Fin. Trust I, et al.*, Lead Case No. 1:03-cv-1003; **DESIGNATES** Silvio Azzolini, Donald Finke, Claire Finke, and Betty Strahle as Co-Lead Plaintiffs; and **APPROVES** of the selection of the law firms of Wolf Haldenstein Adler Freeman & Herz, LLP, and Kirby McInerney & Squire, LLP, as Co-Lead Counsel. Co-Lead Plaintiffs shall

file a consolidated complaint within thirty (30) days of the entry of this Order. Finally, the Court **LIFTS** the stay entered in section VI.C.2 of the Second Management Order (Master File No. 34) and Defendants in those putative securities fraud class actions in which an operative pleading is already in place (*i.e.*, *In re UnumProvident Corp. Sec. Litig.* and *Bernstein v. CorTS Trust for Provident Fin. Trust I, et al.*) shall answer, move, or otherwise respond within thirty (30) days of the entry of this Order. Consistent with section VI.C.3 of the Second Management Order (Master File No. 34), Defendants in the consolidated *Azzolini, et al. v. CorTS Trust II for Provident Fin. Trust I, et al.* action shall answer, move, or otherwise respond to the consolidated complaint within thirty (30) days of date on which such pleading is filed.

SO ORDERED.

ENTER:

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CURTIS L. COLLIER
UNITED STATES DISTRICT JUDGE